

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
FOURTH REGION**

PRO-SPEC PAINTING, INC.<sup>1</sup>

Employer

and

Case 4–RC–20367

DISTRICT COUNCIL 711, INTERNATIONAL  
UNION OF PAINTERS AND ALLIED TRADES,  
AFL-CIO

Petitioner

**DECISION AND ORDER**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The labor organization involved claims to represent certain employees of the Employer.
4. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act, for the following reasons:

The Employer is a commercial painting company with its principal place of business in Vineland, New Jersey. The Petitioner seeks to represent a unit of all full-time and regular part-time painters and apprentices employed by the Employer in the State of New Jersey.<sup>2</sup> The

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<sup>1</sup> The Employer's name appears as amended at the hearing.

<sup>2</sup> The Petitioner's geographical jurisdiction encompasses the State of New Jersey.

Employer contends that the petition should be dismissed because the Employer is not currently performing any work in New Jersey and has no plans to do so in the foreseeable future.

The Employer primarily works on large new construction jobs, such as professional sports stadiums and prisons. During the last three years, the Employer has performed work in at least nine states, as far west as Texas and as far north as New York; the Employer has also bid on jobs as far as Washington State. The Employer has worked on two jobs in New Jersey during the past two years. The first such job was for Rock Church in Pittman, New Jersey; it lasted four to five weeks in April or May of 2001 and required two painters. The second job was the repainting of two wings of a building at the Vineland Community Development Center. The Employer's work on the Vineland job began in December 2001 and ended on February 12, 2002.<sup>3</sup> Since then, the Employer has not performed any work in New Jersey.<sup>4</sup>

The Employer has no current contracts to perform work in New Jersey, no outstanding bids to perform work there, and no plans to make any such bids in the future. Ron Yarbrough, the Employer's owner and principal operating officer, testified that the Employer prefers not to work in New Jersey because that state's public bidding laws generally require the Employer to act as a subcontractor, rather than as a "prime contractor" that contracts directly with the owner of the construction project.<sup>5</sup> He testified that the Employer took the Rock Church job because the Employer's estimator personally knew the general contractor and that the Employer took the Vineland job only because the Employer had no other work at the time. The Employer is presently performing work at a prison in Pennsylvania to be completed in July 2002, at an office building in Texas to be completed in September or October 2002, and at an arena in Texas to be completed at the end of 2002. No employees from New Jersey are working on any of these projects. The Employer also plans to commence work on another prison in Pennsylvania in February 2002, a project expected to last nine or ten months. The Employer is actively seeking work on large commercial painting jobs in other states. Painting employee Phillip Hann performed work for the Employer in New Jersey and testified that he expects to be assigned to work at a project in Pennsylvania soon. Timothy Hemberger, who worked on the Vineland Project, has been terminated or laid off and does not know if or when he will be recalled.

The Board will not conduct an election where the employer's cessation of operations is imminent and certain. *Hughes Aircraft Co.*, 308 NLRB 82 (1992); *Martin Marietta Aluminum*, 214 NLRB 646 (1974). Mere speculation as to the uncertainty of future operations is not sufficient to dismiss the petition. *Hazard Express, Inc.*, 324 NLRB 989, 990 (1997); *Canterbury of Puerto Rico, Inc.*, 225 NLRB 309 (1976). The Board has found that where a construction industry employer has no ongoing projects within the geographic scope of the unit sought and no projects under bid, the petition should be dismissed. *Fish Engineering*, 308 NLRB 836 (1992), citing *Davey McKee Corp.*, 308 NLRB 839 (1992). Conversely, where a construction industry employer has historically had regular projects or has current work, and is currently bidding on

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<sup>3</sup> On that date, the general contractor on the project terminated its subcontract with the Employer. There were between 120 and 250 man-hours remaining on the job at the time.

<sup>4</sup> The record does not indicate whether the Employer hires on a project-by-project basis or uses a core group of employees who move from job to job. It appears however, that at least some employees have worked on more than one job.

<sup>5</sup> He testified that he does not like to work as a subcontractor because the Employer would be subject to additional terms and conditions imposed by a general contractor and would also be subject to the risk of the general contractor going out of business.

other work within the scope of the petitioned-for unit, the Board will find that an election is appropriate. *Greenhorne & O'Mara, Inc.*, 326 NLRB 514 (1998); *Fish Engineering*, supra.

The Employer has no pending jobs and no outstanding bids for work in the unit sought. The Employer has completed only two jobs in the state in the last two years, and the employees who testified at the hearing have no expectation of future work in New Jersey. Even assuming that the Employer might bid for such work if, as in the past, it had no other work, the record shows that the Employer expects to perform considerable work in other states until at least 2003. Accordingly, no useful purpose would be served in conducting an election at this time, and I shall dismiss the subject petition. *Davey McKee Corp.*, supra, 308 NLRB at 840; *Hughes Aircraft Co.*, supra, 308 NLRB at 83.<sup>6</sup>

### **ORDER**

**IT IS HEREBY ORDERED** that the petition filed herein be, and it hereby is, dismissed.<sup>7</sup>

### **RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, Franklin Court, 1099 14th Street, N.W., Room 11613, Washington, D.C. 20570. This request must be received by the Board in Washington by **March 26, 2002**.

Signed: March 12, 2002

at Philadelphia, PA

/s/

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DOROTHY L. MOORE-DUNCAN

Regional Director, Region Four

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<sup>6</sup> To ensure the employee's statutory right to an election, however, should the Employer acquire additional construction projects within the geographical scope of the unit covering the classification of employees described in the petition, I will entertain a motion by the Petitioner to reinstate the petition. See *Davey McKee Corp.*, supra, 308 NLRB at 840; *Cal-Nevada Lodge*, 235 NLRB 1167 (1978).

<sup>7</sup> On February 21, 2002, the Employer filed a Motion to Dismiss the petition that raises the same issues addressed in this Decision. For the reasons discussed herein, the Employer's Motion to Dismiss is hereby granted.

The Employer has additionally asserted that the only appropriate bargaining unit would be limited to work it performed on the Vineland job. In view of the decision to dismiss the petition, it is unnecessary to decide this issue.